



July 25, 2012

**Certified Mail/Return Receipt Requested
and Email**

Ms. Tinka G. Hyde
Director, Water Division
United States Environmental Protection Agency, Region 5
77 West Jackson Blvd.
Chicago, IL 60604-3590

Subject: Permit Application for the S.S. Badger

Dear Ms. Hyde,

We are in receipt of your July 18, 2012 letter regarding the completeness of Lake Michigan Carferry, Inc.'s ("LMC") National Pollutant Discharge Elimination System ("NPDES") permit application for the S.S. Badger ("Badger") received by your office on May 23, 2012. We appreciated the call on July 19, 2012 indicating that before any further testing or analysis is required, EPA wanted to fully review the materials thus far submitted. We are writing this letter and asking that it be placed in the record of the permit application, and posted on the website along with the July 18 letter, if that is posted. We are doing so because we respectfully believe that the July 18 letter does not constitute a valid determination of incompleteness and does not include certain facts we think are relevant to EPA's consideration of the application. That said, we do believe EPA has the authority to fully consider all of the information that has been provided, but is not required to do so within 60 days of the submission of LMC's May 23 application as the July 18 letter seems to imply.

Our primary concern is this: the July 18 letter is described as a determination of incompleteness pursuant to 40 C.F.R. § 124.3.¹ However, as explained below, the letter does not

¹ The applicable regulations (40 C.F.R. § 124.3) provide, in pertinent part:

(C) The Regional Administrator shall review for completeness every application for an EPA-issued permit. . . . Each application for an EPA-issued permit submitted by an . . . existing NPDES source or sludge-only facility **should be reviewed for completeness within 60 days of receipt**. Upon completing the review, the Regional Administrator shall notify the applicant in writing whether the application is complete. **If the application is incomplete, the Regional Administrator shall list the information**

meet the requirements to constitute a notice of incompleteness as those terms are used in the cited regulation.

First, the letter seems to be premised on EPA's conclusion that a completeness determination is to be made prior to July 22, *i.e.*, 60 days after the submission of the permit application.² Section 124.3 merely states EPA "should" determine whether the permit application is complete within 60 days of receipt of a permit application. It does not require that the determination be made by that date in order to be consistent with the regulations. We believe EPA has the discretion to take some additional time to review the information if it so chooses.

Second, the regulation requires that a notice of incompleteness "**list the information necessary to make the application complete.**" *Id.* (emphasis added). The letter says that the May 23 application "did not contain the five coal ash effluent samples and two ambient lake water samples required by EPA in its letter dated February 24, 2012." This statement omits several key facts. To begin with, as we explained in our email of May 31, 2012, we did not understand the February 24 letter to require, unconditionally, the submission of samples and tests that could cost over \$70,000, but rather that such additional testing would be undertaken if necessary, based on a number of factors described below.

Moreover, it was not possible to take additional samples or have them analyzed by May 23.³ In fact, these samples could not have been submitted until at least the end of June, given the fact that the Badger does not begin operating until the last week in May, and the testing protocol that EPA called for required additional time for analysis. More importantly, as EPA knows, these additional samples and tests are extraordinarily expensive – possibly over \$10,000

necessary to make the application complete. When the application is for an . . . NPDES source . . . the Regional Administrator shall specify in the notice of deficiency a date for submitting the necessary information. The Regional Administrator shall notify the applicant that the application is complete upon receiving this information. After the application is completed, the Regional Administrator may request additional information from an applicant but only when necessary to clarify, modify, or supplement previously submitted material. Requests for such additional information will not render an application incomplete.

(emphasis added).

² LMC's May 23 permit application was timely within the meaning of 40 C.F.R. § 122.21(c) because it was filed both more than 180 days prior to expiration of the current permit and prior to the June 29 date designated in EPA's February 24 letter.

³ Someone reading the EPA letter might get the impression that LMC could have but chose not to conduct the additional samples prior to May 23, which is not the case.

each. We notified EPA that we had already undertaken what our experts advised us are substantially similar analytical testing of samples acquired in 2011. We thought it reasonable for EPA to consider these results first, and if, after doing so, it thought additional sampling was needed, LMC would endeavor to provide it.⁴ That is why LMC submitted its application more than a month before the June 29 date referenced in the February 24 letter. LMC again referred to the possibility of additional testing in the application itself. LMC believed that, should EPA ultimately determine that additional testing would be necessary, it could request additional testing as “necessary to clarify, modify, or supplement previously submitted material” pursuant to its authority reflected in the last sentence of 40 C.F.R. § 124.3(C). It was not until late June that EPA clarified that it viewed the referenced additional tests as unconditionally required, regardless of the analytical testing already done from the 2011 samples.

Third, if EPA does issue a notice of incompleteness, Section 124.3 requires that EPA provide “a date for submitting the necessary information.” No such date is included in the July 18 letter for good reason – at this time EPA does not require more information, but rather needs more time to consider the supplemental information provided subsequent to the May 23 application. Under these circumstances, the notice of incompleteness under the cited regulation seems to be premature and unnecessary.

We also think it is important that the record fairly reflect the circumstances under which the additional information submitted after May 23 was provided. On June 4, 2012, we informed EPA that LMC would be conducting additional, supplemental coal ash sampling events on June 6, 2012 to confirm the results provided in its permit application. LMC advised that we planned to take lake water samples using the methodology EPA described in its February 24 letter, and that we would collect coal ash samples, one from the trip to Manitowoc and one on the trip back to Ludington (totaling two coal samples and one lake sample). Those samples would be analyzed using EPA approved methods. LMC initially planned to take two ash samples rather than five because of the cost. We suggested that EPA compare the analytical results of these samples to our existing 2011 analyses, and if they were reasonably consistent, then perhaps the three additional ash samples suggested in EPA’s February 24 letter (possibly costing more than \$30,000) would be considered unnecessary. We also wanted to make sure that EPA was satisfied with the sampling and testing methods, given the unusual nature of what was being requested.

That same day, EPA instructed LMC to use a lake water sampling methodology not approved by EPA regulations. The analytical testing method that EPA required (EPA Method 1638 as opposed to EPA Method 200.8) could not be performed by our accredited laboratory, and had to be sent to the west coast, given the time constraints. At that time, EPA expressed no concern over LMC’s plans to conduct two ash sampling and testing events and wait to review the results before conducting more tests, nor was it suggested that all five were required regardless of those results. LMC was later told that although EPA did not object to our proposal to follow

⁴ We had these discussions on March 6, when EPA offered to listen to questions LMC had about the February 24 letter, and on other occasions as well.

this iterative and hopefully less expensive process, it was LMC's obligation to assume that the five tests referenced in the February 24 letter remained required, and EPA had no further obligation to make that clear.⁵

As expected, the results from the two June 6 ash samples, which were sent to EPA on June 21, were largely consistent with the data submitted in the May 23 permit application and confirmed that concentrations of pollutants from the ash slurry that enter Lake Michigan are below applicable water quality standards and policies.⁶

On June 20, 2012, EPA sent a letter indicating that its February 24, 2012 letter had intended to unconditionally require that LMC submit five (5) independent samples of the coal ash slurry with its permit application. LMC believed, from its discussions with EPA prior to that date, that its proposal to do two and then follow with three more samples if appropriate was acceptable to EPA. When EPA described the five-test methodology in its February 24 letter, it had not yet considered the analysis LMC did in 2011. Since the costs of additional testing were expected to be over \$10,000 *per sample*, LMC believed its proposal to conduct two additional sampling events to supplement the permit application was reasonable. At that time, EPA was aware that any further new sampling could not be conducted until after the Badger started operating in late May and that it generally takes weeks to get the results (unless one pays significantly more for expedited review). As noted, EPA has since told LMC that it had no obligation to respond to our proposal, and under the circumstances we should have assumed the five-test approach was required.⁷

On June 22, 2012, LMC responded that although it did not agree that LMC's permit application is incomplete without all five (5) new ash samples and test results, it would conduct additional sampling events using the same methodology and analysis as the June 6 supplemental test. In that letter, LMC explained that the earliest it would be able to provide EPA with the requested information (including test results and the quality assurance/quality control ("QA/QC") report) was about July 22, 2012. The additional samples were taken on June 26.

⁵ Telephone call between N. Cantello and B. Hartman (June 22, 2012).

⁶ A small portion of the ash did contain slightly higher levels of some metals and mercury than that reported in the 2011 test results, but still well below any level of concern.

⁷ There is no requirement in any regulation or guidance that five samples be submitted and, in fact, EPA guidance says as much. The EPA guidance referenced in the June 20 letter specifically says that if fewer tests are done, it simply means that a higher uncertainty factor should be applied. Technical Support Document for Water Quality-based Toxics Control, 53, 106-107 (EPA/505/2-90-001, March 1991). Since the presence of contaminants was so low, it did not raise any levels of concern. As noted above, when we talked to EPA in February, March and May, no one said that the five new sampling events were an unconditional requirement of the application.

On June 25, EPA raised questions about certain sample preparation procedures used in the accredited lab that was conducting the ash sample analyses. As we understand it, EPA was concerned that the samples were not fully representative of the slurry because, despite following the protocol for agitation of the ash and water mixture, there was some settlement of coal ash in the few minutes between agitation and drawing of samples. This is a concern that everyone was well aware of and that EPA even mentioned in its February 24 letter.⁸

As a result, on June 27, EPA suggested that the level of ash in the samples should be calculated with a “weigh in” process and smaller samples, rather than using the extended agitation process with larger samples outlined in the February 24 letter. At that point, in order to meet EPA’s July 23 deadline, the accredited lab that had been instructed to expedite the sample preparation and analysis and was already using the previously-directed method on the June 26 samples.⁹ Ultimately, and despite the expansive and expensive nature of these expedited tests, EPA was in possession of all of LMC’s additional sampling results and documentation by July 17, 2012, ahead of the July 22, 2012 anticipated completion date. We understand that EPA is considering these results now and that pending its review, no further testing is required.

LMC has conducted sampling and testing that is likely to cost up to or over \$70,000. The results continue to consistently demonstrate that, using NPDES calculation methodology, the concentrations of pollutants from the ash slurry that enter Lake Michigan are below applicable water quality standards and policies.

LMC continues to believe that its May 23 application was complete, but also continues to provide supplemental information as requested by the agency, and agrees that the agency may request certain supplemental information. We do not believe, however, that the July 18 letter constitutes a valid notice of deficiency as described in the regulations, and want our views on that placed in the record. EPA could have determined that our original 1,000+ page application was complete and sought additional information under 40 C.F.R. § 124.3(C), or just advised LMC that EPA needed more than 60 days to conduct its review in light of the current circumstances. It could do the same today. Calling this application incomplete was neither necessary nor appropriate, and could lead someone to think LMC is not doing everything it reasonably can to support EPA’s review of its application, which is not the case.

⁸ “Maintaining a homogenous sample during preparation of the sample aliquots from the composite container is expected to be difficult because the ash is expected to settle easily. One possible method to maintain a homogenous sample is to remove the sample aliquot from the composite container using a peristaltic pump with tubing while simultaneously stirring the container contents.” February 24, 2012 letter at 2. Of course, LMC relied on its accredited lab to follow appropriate laboratory procedures in this regard.

⁹ We have offered to run additional tests using the alternative weigh-in sample preparation methodology (EPA’s revised testing procedures) with the remaining ash samples. We appreciate that EPA has indicated that this effort can be delayed while it considers the current results.

Ms. Tinka G. Hyde
July 25, 2012
Page 6

We look forward to continuing to work with you throughout this process.

Sincerely,

A handwritten signature in blue ink that reads "Chuck Leonard". The signature is fluid and cursive, with a long, sweeping tail on the "d".

Chuck Leonard
Vice President, Navigation

cc: William Creal, MDEQ (email)
Kenneth Johnson, WDNR (email)
Barry M. Hartman, Esq.